ZAINUDIN MUHAMMAD

v.

ATSCO LTD & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ALAUDDIN MOHD SHERIFF JCA
RICHARD MALANJUM JCA
[CIVIL APPEAL NO: W-03-87-2000]
11 DECEMBER 2002

CIVIL PROCEDURE: *Judgments and orders - Consent judgment - Alteration of terms - Amendment of order - Whether could be allowed upon objection by the other party*

By a consent judgment entered into between the parties, the applicant agreed to remit several payments to the respondents, beginning 6 July 2001, as a condition for him to defend the suit against him. Unable to raise the first payment of RM2 million thereof, the applicant applied for extension of time to comply with the terms of the consent order, and subsequently for leave to amend the same. The respondents objected to the application and in the circumstances a question arose as to whether both applications, on account of the objection, ought to be dismissed.

Held:
Per Richard Malanjum JCA

[1] It is trite law that a consent order cannot be varied unless with the agreement of the other party or parties affected by it. Neither can it be set aside unless the conditions are met. (p 448 g)

[2] In the instant case, the requirements were not met. The respondents objected to the application and there was no allegation advanced to justify in law the setting aside of the consent order or its variation in any manner. Further, it is unfair to the respondents that the applicant, after securing a conditional leave to defend the suit, should be allowed to renege or delay in complying with the terms thereof. (pp 448 h & 449 c)

[Application dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Melalui suatu penghakiman persetujuan yang dimeterai mereka, pemohon bersetuju membuat beberapa pembayaran kepada responden, bermula 6 Julai 2001, sebagai syarat bagi membolehkan ia membela tindakan yang diambil terhadapnya. Pemohon tidak mampu untuk membuat bayaran pertama berjumlah RM 2 juta seperti yang dipersetujui, dan kerana itu memohon perlanjutan masa untuk mematuhi terma-terma perintah persetujuan, serta kebenaran bagi meminda perintah tersebut. Permohonan pemohon dibantah oleh responden, dan dengan itu timbul persoalan sama ada kedua-dua permohonan pemohon harus ditolak ekoran bantahan yang dibuat oleh responden tersebut.

Diputuskan:
Oleh Richard Malanjum HMR

[1] Sudah menjadi suatu undang-undang biasa bahawa sesuatu perintah persetujuan tidak boleh diubah kecuali jika ianya dipersetujui oleh pihak yang satu lagi yang menerima kesan darinya. Ia juga tidak boleh diketepikan jika syarat-syaratnya gagal dipenuhi.

[2] Dalam kes semasa, syarat-syaratnya jelas tidak dipenuhi. Responden telah membantah terhadap permohonan dan tiada apa jua pengataan diutarakan bagi menjustifikasikan pengetepian perintah persetujuan tersebut atau pengubahan termanya di sisi undang-undang. Lagipun, ianya tidak adil bagi responden bahawa pemohon, selepas memperoleh izin bersyarat untuk membela tindakan, dibenarkan pula melengah atau mengelak dari mematuhi terma-terma tersebut.

[Permohonan ditolak.]

Case(s) referred to:
Huddersfield Banking Co Ltd v. Henry Lister & Aon Ltd [1895] 2 Ch 273 ***(refd)***
Maria Chia Sook Lan v. Bank of China [1976] 1 MLJ 245 ***(refd)***
Matthews v. Munster [1886-90] All ER Rep 251 ***(refd)***
Tio Chee Hing v. Tractors Malaysia Bhd [1973] 1 MLJ 66 ***(refd)***
Zainuddin Muhammad v. Atsco Ltd & Anor [2001] 4 CLJ 141 ***(refd)***

For the appellant - K Kirubakaran; M/s Kiru & Yong
For the respondent - K Anantham; M/s Skrine & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D5-22-596-1999]

Reported by WA Sharif

JUDGMENT

Richard Malanjum JCA:

On 8 October 2002 after hearing submissions of learned counsel for the respective parties we dismissed both the applications of the applicant. The first application was for extension of time to comply with the term of the Consent Order dated 5 June 2001 while the other was to amend the main prayer in the first application.

Dissatisfied with our decision the applicant has now filed in the Federal Court an application for leave to appeal.

Since our reason for dismissing both the applications is common we will therefore deal with them together.

The original application by way of notice of motion dated 20 June 2001 relates to an earlier matter between the same parties in which this court has already given its decision. (See: *Zainuddin bin Muhammad v. Atsco Ltd & Anor* [2001] 4 CLJ 141). Hence we need not have to deal with the factual background as it has been dealt with therein.

The order asked for in the original application was for an extension of six months from 6 July 2001 as required in the Consent Order to make the first payment of US$2 million being part of the several payments agreed upon as a condition for the applicant to defend the suit against him. However before it was heard the applicant filed an application *vide* a notice of motion dated 19 July 2002 for leave to amend the main prayer sought for in the earlier motion. The proposed new prayer was for a stay or postponement of the Consent Order until the disposal of the suit against the applicant.

The respondent objected to both the applications.

Now it is trite law that a consent order cannot be varied unless with the agreement of the other party or parties affected by it. Neither can it be set aside unless the conditions are met. (See: *Tio Chee Hing v. Tractors Malaysia Bhd* [1973] 1 MLJ 66; *Maria Chia Sook Lan v. Bank Of China* [1976] 1 MLJ 245 (also [1975-1977] SLR 9); *Huddersfield Banking Co Ltd v. Henry Lister & Son Ltd* [1895] 2 Ch 273; *Matthews v. Minister* [1886-90] All ER Rep 251).

In the instant case the requirements were not met. The respondent objected to the application and there was no allegation advanced to justify in law the setting aside of the Consent Order or its variation in any manner. There was no dispute that the Consent Order was secured with the benefit of legal advice to all parties

involved. The assertions relied upon by the applicant in both the motions were either issues that could have been raised before the Consent Order was agreed upon or that they were irrelevant. For instance it is his averment that the hearing of the suit against him has been long due. However that has nothing to do in him complying with the terms of the Consent Order. After all he was given a conditional leave to defend the suit. In any event such a complaint is purely an administrative issue which his solicitors should be able to handle. As to the constraint of his travel overseas that should be of no relevance in his inability to meet the term of the Consent Order. In this day and age transmitting money from one country to another does not require the presence of the account holder. Indeed we would think that it could tantamount to having misled the other party into agreeing to the Consent Order when the applicant could have known of his limitation in meeting the terms therein. It would be quite unfair to the respondents that the applicant, after securing a conditional leave to defend the suit, should be allowed to renege or delay in the compliance with the main term of the Consent Order on the grounds which should have been within his personal knowledge at the material time.

For the reasons given we dismissed both the applications.